Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

RICHARD N. MOSEMAN AND DANIEL ROUSSEAU,
Petitioners,

v.

BLAKE VAN LEER, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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58pp

QUESTION PRESENTED

Section 29(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78cc(a), provides that "[a]ny . . . stipulation . . . binding any person to waive compliance with any provision of this title or of any rule or regulation thereunder . . . shall be void." The question presented is whether this provision may properly be interpreted as permitting a purchaser of securities to use a release obtained from the seller in a negotiated securities transaction to bar the seller's action for damages resulting from the purchaser's fraud in that transaction.

LIST OF PARTIES AND RULE 29.1 LISTING

The parties in the court below were the Petitioners, Richard N. Moseman and Daniel Rousseau, and the respondents, Blake Van Leer; Garnet, Incorporated; Garnet of Virginia, Incorporated, now known as King George Landfill, Incorporated; Garnet of Maryland, Incorporated; Garnet Enterprises, Incorporated; Cross Road Trail, Incorporated, Rollins Avenue, Incorporated; King George Land Company, Incorporated; BKJB Partnership; Robert D. Cheeley; James E. Butler, Jr.; Bobby M. Thomas; and Keith R. Breedlove.

There are no related corporations in which investors or outside persons hold an interest.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Richard N. Moseman and Daniel Rousseau respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-8a) is reported at 263 F.3d 129. The opinion of the district court (App., *infra*, 9a-29a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 2001 (App., *infra*, 32a). The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 29(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78cc(a), provides that "[a]ny condition, stipulation or provision binding any person to waive compliance with

any provision of this title or of any rule or regulation thereunder . . . shall be void."

Section 10(b) of the Act, 15 U.S.C. § 78j(b), makes it unlawful for any person, through use of interstate media, to use, in connection with the purchase or sale of securities, any deceptive device in contravention of rules prescribed by the Securities and Exchange Commission. The Commission's rule 10b-5, 17 C.F.R. § 240.10b-5, provides that it is unlawful for any person, by the use of any means or instrumentality of interstate commerce, "to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading . . . in connection with the purchase or sale of any security."

STATEMENT

Petitioners, Richard N. Moseman and Daniel Rousseau, were co-investors with respondents Blake Van Leer and BKJB Partnership in a group of corporations organized in the mid-1980s to develop and operate waste disposal landfill sites in Maryland and Virginia. Following the sale of the corporations in early 1996, Moseman and Rousseau brought suit under the antifraud provisions of the Securities Exchange Act against Van Leer, BKJB and others in the U.S. District Court for the District of Maryland, alleging that the defendants, who had conducted the negotiations with the buyer, withheld material facts that, if known to plaintiffs, would have caused them not to sell their shares at the price they agreed upon. The district court granted defendants' motion for summary judgment dismissing the complaint, holding that releases plaintiffs gave to defendants in connection with the sale of their shares barred them from recovering. The Court of Appeals for the Fourth Circuit affirmed, acknowledging that its decision conflicts with at least one decision of the Ninth Circuit.

According to the undisputed facts as recited by the district court, until 1985 Van Leer and Rousseau had been employed by a construction company owned by Moseman. Following his sale of that company in 1985, Moseman provided the capital for the three men to organize the landfill development companies, known as the Garnet companies. In 1995 BKJB Partnership provided additional capital and, by the time of the transactions in question, owned 65 percent of the outstanding stock of the corporations, with Van Leer, Moseman and Rousseau owning equal portions of the remaining 35 percent. Van Leer was the chief executive officer of the companies, Rousseau provided engineering support, and Moseman was a passive investor.

In January 1996 Van Leer and BKJB began negotiating a sale of the companies to Sanifill, Inc. Simultaneously, Van Leer negotiated terms of transactions with Moseman and Rousseau whereby the companies would redeem their shares prior to the sale to Sanifill. During the latter negotiations, Moseman's attorney, in an effort to determine what consideration Van Leer would be receiving in the sale of the companies, asked company counsel for a copy of the Sanifill transaction documents. Company counsel refused, telling Moseman's attorney that Van Leer had instructed him not to disclose any aspect of the Sanifill transaction, but that the terms were not materially different from terms proposed by a prior prospective buyer, with which Moseman was familiar. A second effort to find out how much Van Leer would receive resulted in the disclosure that Van Leer would receive deferred payments based on the operations of one of the landfills, but that those payments would not be substantially more than the amount Moseman would be receiving in redemption of his shares. Moseman proceeded with the redemption without making further efforts to obtain additional information on the terms of the Sanifill transaction.

Rousseau, who was not represented by counsel in the transaction, was unaware that royalties were even a possibility and was told by Van Leer that the redemption terms offered were fair and reasonable and the best he could expect. He made no inquiry as to what the other shareholders were receiving before proceeding with the redemption of his shares.

As part of the share redemption transactions, both Moseman and Rousseau executed agreements releasing Van Leer, BKJB and the Garnet companies "from all and every manner of action . . . that Moseman [or Rousseau] ever had, now has, or may hereafter have . . . for . . . any matter, cause or thing whatsoever" as of the date of the agreement. When Moseman and Rousseau subsequently learned that the cash and royalties Sanifill had agreed to pay Van Leer and BKJB were substantially greater than the proportionate consideration they had received in redemption of their shares, Moseman and Rousseau claimed that Van Leer and BKJB had fraudulently withheld that information, in violation of rule 10b-5 under the Exchange Act, in order to increase their proportionate share of the total consideration Sanifill had been willing to pay.[1]

The district court, in disposing of defendants' motion for summary judgment, correctly assumed that neither Moseman nor Rousseau had knowledge of the withheld material facts when they signed their releases. It held, however, that section 29(a) of the Exchange Act invalidates only anticipatory releases of statutory claims, not a release of a mature, ripened claim of which the releasing party had knowledge before signing the release, and that a releasing party has knowledge of a claim "when he has actual knowledge or should have had

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[1] Although not mentioned in the district court's opinion, Moseman and Rousseau alleged that the consideration received by Van Leer was some 20 times that paid to them in the redemption of their shares.

knowledge upon a reasonable inquiry," citing *Goodman v. Epstein*, 582 F.2d 388 (7th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979). App. *infra*, 27a. The court concluded that the releases signed by Moseman and Rousseau were not invalid under section 29(a)—and therefore barred their claims—because both "had reason to know" of the withheld facts. This, in turn, was based upon the court's conclusion that both had been put on notice of the need for further inquiry simply by virtue of having been asked to sign releases, that Moseman had been further alerted that he was not being given all the information he desired, and that neither had conducted further inquiry. App. *infra*, 28a. Although it recognized that "[w]hat constitutes reasonable inquiry will differ from situation to situation" (App. *infra*, 28a), the court did not explain how it was able to conclude that the inquiry that had been conducted was not reasonable as a matter of law, thus enabling the court to resolve the matter on summary judgment.

In affirming the district court's grant of summary judgment dismissing the action, the court of appeals recognized that the Court of Appeals for the Ninth Circuit in *Burgess v. Premier Corp.*, 727 F.2d 826 (1984), had held that a release of federal securities claims is valid only with respect to claims of which the party signing the release has actual knowledge. The court concluded, however, that the Seventh Circuit's "reasonable inquiry" standard followed by the district court "sufficiently meets the purposes of the Securities Act [*sic*] when a release is given as bargained for consideration," and that the district court correctly concluded that "neither Moseman nor Rousseau conducted a reasonable inquiry with respect to whether they had claims against Van Leer." App. *infra*, 7a, 8a. The court did not address their argument that the district court had erred in failing to allow a jury to determine whether they had acted reasonably.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS' INTERPRETATION OF SECTION 29(A) CONFLICTS WITH THOSE OF THE NINTH AND FIFTH CIRCUITS.

As noted, the Fourth Circuit adopted the Seventh Circuit's reasonable-inquiry standard rather than the Ninth Circuit's actual-knowledge test for determining the validity of a release.

In *Royal Air Properties, Inc. v. Smith*, 333 F.2d 568, 571 (1964), the Court of Appeals for the Ninth Circuit held that "waiver of rights under the Securities Exchange Act of 1934 should be limited to those cases where it is intended, and that therefore the right in question must be found to be actually known before waiver becomes effective." The court reasoned that "waiver is the voluntary or intentional relinquishment of a known right. It emphasizes the mental attitude of the actor. Since waiver is a voluntary act, there must be knowledge of the right in question before the act of relinquishment can occur." *Id.* (citations and internal quotations omitted).[2]

The asserted waiver addressed in *Royal Air Properties* took the form of the plaintiff's conduct following receipt of

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[2] The court observed:

> Although the formulation of the doctrine is simple, the courts have not been uniform in deciding what facts will support a waiver. In particular, they have differed as to what constitutes knowledge of a right claimed to be waived. Some courts have held that there is a duty to make inquiry if one learns facts sufficient to put him upon notice, and that knowledge of all the facts that a reasonably diligent inquiry would disclose will be imputed. Others have stressed that full knowledge of a right is a prerequisite to its waiver, one stating that the doctrine of waiver or ratification is founded upon the fact of knowledge of all the facts, and not upon negligence.

Id. (citations and internal quotations omitted).

information relevant to the alleged fraud. Confronted with a waiver, as here, in the form of a release executed in connection with the defendant's repurchase of the plaintiffs' securities, the same court, in *Burgess v. Premier Corp.*, 727 F.2d 826, 831 (9th Cir. 1984), held (citing *Royal Air Properties*), "A release is valid for purposes of federal securities claims only if the [plaintiffs] had 'actual knowledge' that such claims existed."

In *Goodman v. Epstein*, 582 F.2d 388 (1978), followed by both lower courts here, the Seventh Circuit affirmed the following jury instruction on the issue whether a release given by the plaintiffs barred their securities fraud claim:

> If you find that the plaintiffs have not met the burden of proving . . . that the release and discharge of the defendants . . . was procured by fraud, you must find for the defendants with respect to all claims . . . of which the plaintiffs knew or upon reasonable inquiry could have known before signing the release . . . .

582 F.2d at 395-96 n.20. Observing that the courts were divided on the question whether actual knowledge was required for a waiver by release to be valid, the court of appeals concluded that the "reasonable inquiry" standard,

> which admittedly places some duty of inquiry on the party signing the release, is the more readily acceptable as fulfilling the policy requirements of the federal securities laws and needs of judicial economy.

Id. at 403. The court reasoned as follows:

> The requirement that a person exercise reasonable inquiry to discover possible matured claims existing at the time of execution of a waiver does nothing to defeat the general policy against the *in futuro* waiver of securities claims. *See, e.g., Wilko v. Swan, [346 U.S. 427 (1953)]* . . . . Quite to the contrary, it insures that

> the signing of a waiver is something that will not be undertaken lightly, with the expectation that the waiver will be unenforceable even as to existing claims because the party executing the waiver has kept his eyes closed, and therefore did not "know." Such a "reasonable inquiry" policy also favors the honest settlement of claims which is recognized as essential to the continued functioning of our judicial system.

Id. at 404.

Although the *Goodman* court did not mention the Ninth Circuit's decision in *Royal Air Properties* or discuss whether a waiver need be an intentional act, the court did acknowledge, 582 F.2d at 403, that its reasonable-inquiry requirement conflicted with the law of the Fifth Circuit as set forth in *Childs v. RIC Group, Inc.*, 447 F.2d 1407 (1971), *aff'g per curiam*, 331 F. Supp. 1078, 1083 (N.D. Ga. 1971), which held that "[a] party does not waive [statutory] rights without acting in full knowledge thereof." *See also Murtaugh v. University Computing Co.*, 490 F.2d 810, 817 (5th Cir. 1974), *cert. denied*, 419 U.S. 835 (1974) (concluding that a finding that plaintiffs "intentionally and knowingly waived their statutory rights under the securities acts" was a prerequisite to the validity of a release from liability).

In rejecting the Ninth Circuit's approach, the court below observed that *Burgess* had relied upon *Royal Air Properties*, which did "not involve a signed release at all, but rather an *implicit* waiver of the right to sue," which, it noted, "the *Royal Air* court specifically observe[d] . . . is 'unilaterally accomplished.'" App. *infra*, 7a (emphasis in original; citation omitted). The court found this distinction dispositive, because "[t]he mere fact that an individual has been asked to sign a release should be sufficient to put that individual on notice that a reasonable inquiry should be undertaken." *Id.* (quoting *Goodman*, 582 F.2d at 404).

II. THE COURT OF APPEALS' DECISION IS ERRONEOUS.

The court of appeals' interpretation is contrary to the plain language of the statute. Section 29(a) voids "[a]ny . . . stipulation . . . binding any person to waive compliance with any provision of [the Securities Exchange Act] or of any rule or regulation thereunder." The releases Moseman and Rousseau signed as part of the redemption of their shares constituted stipulations binding them to waive Van Leer's and BKJB Partnership's compliance with section 10(b) of the Act and rule 10b-5 thereunder in connection with the redemption. It could not be clearer that the statute, on its face, rendered the stipulations void.

Because a literal reading of section 29(a) could prevent parties from settling ongoing securities fraud litigation, the courts understandably have construed the section as not invalidating agreements settling existing fraud claims of which, by definition, the claimant has knowledge. Thus in *Korn v. Franchard Corp.*, 388 F. Supp. 1326, 1329 (S.D.N.Y. 1975), the court concluded that section 29(a) and its counterparts in the other securities acts

> should not be construed to apply to the release of matured claims. To rule otherwise would foreclose the parties from settling matured claims and force every claimant to pursue the litigation to its costly conclusion. Many small but otherwise settleable cases would have to be dropped and many large but otherwise settleable cases would clog the dockets of the federal courts. This would not only constitute a blow to judicial economy, but to justice and common sense as well. See Mittendorf v. J.R. Williston & Beane, 372 F. Supp. 821, 835 (S.D.N.Y. 1974).

Indeed, it was from language in both the *Korn* decision and the *Mittendorf* case cited in *Korn* that the district court in

Goodman fashioned its "reasonable inquiry" jury instruction that the Seventh Circuit upheld. *See Goodman*, 582 F.2d at 403.

Both *Korn* and *Mittendorf*, however, involved releases given in the context of active controversies long after the transactions in question.[3] This is a far cry from the release in the present case, waiving compliance with the antifraud provisions in the very transaction in which the release was given. The Ninth Circuit recognized this distinction in *Petro-Ventures, Inc. v. Takessian*, 967 F.2d 1337 (1992), where, after acknowledging that *Burgess* was still the law in the circuit, 967 F.2d at 1338, upheld the validity of a release of unknown securities fraud claims on the ground that the release in question was entered into in settlement of pending litigation, unlike that involved in *Burgess*, which was executed while the parties "were still dealing in an exclusively business relationship. . . ." *Id.* at 1341.[4] The common-sense policy "favor[ing] the honest settlement of claims" referred to in *Goodman*, 582 F.2d at 404, simply has

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[3] In *Korn*, the release language was on checks endorsed by the plaintiffs some six years after their investment and after they had been "notified on four separate occasions that *this lawsuit* had been commenced on their behalf." 388 F. Supp. at 1332. In *Mittendorf*, the release was given five years after the allegedly fraudulent securities transaction "at a time when two separate litigations . . . against . . . substantially the same defendants . . . and involving substantially the same allegations were already in progress in this Court." 372 F. Supp. at 834.

[4] As one district court has noted, "[i]t would be at least highly anomalous . . . to hold under section 29(a) that a party, without knowing the facts, could effectively bar himself by a release from suing for fraud *in the transaction of which the release was part*." *Schine v. Schine*, 254 F. Supp. 986, 988 (S.D.N.Y. 1966) (emphasis added).

no application to releases executed in the transaction itself before the plaintiff even knows he has a fraud claim.[5]

The court below, as well as the Seventh Circuit in *Goodman*, rationalized their holdings in part on the basis that the "reasonable inquiry" standard would insure that parties did not sign releases "lightly" with the expectation that they would be unenforceable. App. *infra*, 6a; 582 F.2d at 404. This rationale turns the federal securities laws, and particularly section 29(a), on their heads. The antifraud provisions of the securities laws are intended to protect the victims of fraud, not the perpetrators. A policy of discouraging victims from taking releases lightly in the expectation that they will not be enforced seems, rather, to protect the perpetrator of a fraud from being misled into believing that his fraud has succeeded, when in fact he may later be called to account for it. Whatever the benefits of such a policy generally, it is surely contrary to any policy furthered by the federal securities laws, which expressly provide that such releases are indeed unenforceable.

Although the court below recognized that its decision conflicted with the Ninth Circuit's decision in *Burgess*, it distinguished the present case from the Ninth Circuit's *Royal Air Properties* decision on the basis that that case involved an implicit waiver, whereas the waiver in the present case was bargained for. The court seemed to find this distinction dispositive because, as the Seventh Circuit had pointed out in *Goodman*, the mere fact that one has been asked to sign a release should put him on notice of the need to undertake further inquiry. App. *infra*, 6a. But the *Royal Air Properties* court based its holding that "the right in question must be . . . actually known before waiver becomes effective" on the

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[5] Even in *Goodman* the release, while executed shortly after a securities purchase, was not part of the transaction itself. *See* 582 F.2d at 394.

principle that waiver is a voluntary or intentional act that cannot occur without knowledge of the right being relinquished. 333 F.2d at 571. The statute, of course, refers only to agreements to "waive" compliance with the law. It does not distinguish between forms of waiver and provides no basis for an interpretation that some forms require reasonable inquiry for the waiver to be void under the statute while others do not. Indeed, this Court has recognized that under section 29(a),

> The voluntariness of the agreement is irrelevant . . . ; if a stipulation waives compliance with a statutory duty, it is void under § 29(a), whether voluntary or not. Thus, a customer cannot negotiate a reduction in commissions in exchange for a waiver of compliance with the requirements of the Exchange Act, even if the customer knowingly and voluntarily agreed to the bargain.

Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 230 (1987).

III. THE QUESTION PRESENTED IS IMPORTANT.

The lower court's decision provides an instruction manual for persons committing intentional securities fraud to avoid liability to their victims. Under the decision, one party to a securities transaction may immunize itself from liability for intentional fraud in the transaction simply by obtaining a release from the other party. If the further inquiry the court believes should follow the request for the release results in full disclosure, there will either be no fraud or no transaction. But intentional fraud, by definition, does not occur accidentally, and it is unrealistic to think that a securities purchaser bent on giving false information or withholding critical facts in order to induce a purchase will be motivated to make full disclosure simply because the seller, having been asked to sign a release, asks more questions.

Nor will the ability to avoid liability be limited to cases involving formal "releases." A provision in a securities purchase agreement to the effect that the purchaser has conducted its own investigation and is not relying upon any representation of the seller is likely to have the same effect, as is a provision that the seller makes no representations or warranties other than those expressly set forth in the agreement. As the court pointed out in *Rogen v. Illikon Corp.*, 361 F.2d 260 (1st Cir. 1996),

> [W]e see no fundamental difference between saying, for example, "I waive any rights I might have because of your representations or obligations to make full disclosure" and "I am not relying on your representations or obligations to make full disclosure." Were we to hold that the existence of this provision constituted the basis (or a substantial part of the basis) for finding non-reliance as a matter of law, we would have gone far toward eviscerating Section 29(a).

Id. at 268 (footnote omitted).

The reasonable inquiry standard is also impractical and can easily lead to unjust results. It is impractical, because it is based essentially on hindsight—a determination of what facts would have been revealed to the claimant had he or she made further inquiry. It can lead to unjust results by inviting defendants to provide the required response when asked what disclosures would have been forthcoming if the claimant had only asked. A claimant will be hard-pressed to dispute a defendant's *post hoc* assertion that he would have disclosed all the material facts. The standard also invites courts on summary judgment, as here, simply to assume that further inquiry would have led to full disclosure.

Indeed, it is far from clear exactly what the reasonable-inquiry standard means. Logically, it would seem that if one signing a release is held to a duty to make reasonable inquiry,

he should be held to have knowledge of all facts that such inquiry *would* have revealed. The district court here, however, said one has knowledge of a claim when he has actual knowledge or "should" have knowledge upon reasonable inquiry. The instruction upheld by the Seventh Circuit in *Goodman* referred to claims of which the claimant "could" have known upon reasonable inquiry. The Fourth Circuit here seems to have adopted the latter formulation, but made no attempt to determine what facts Moseman or Rousseau could have learned, and from whom, upon further inquiry. Nor did it suggest how much inquiry would be reasonable, simply concluding that Moseman, having been told that Van Leer's terms were not materially different from his own, should have assumed that this was a lie and inquired further and that Rousseau, having been asked to sign a release, should have made inquiries the nature of which the court did not specify.

And finally, the decision below can only serve to undermine the settled principle that private plaintiffs suing under rule 10b-5 are not required to conduct due diligence investigations. As the *Goodman* court noted, as a result of this Court's holding in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), that only intentional frauds were actionable under rule 10b-5, the Seventh Circuit and other courts of appeals had determined that plaintiffs in such actions would no longer be required to exercise due diligence in acquiring knowledge about their investments as a condition to recovery. The court itself thus expressed concern that, by requiring plaintiffs signing releases to have exercised reasonable inquiry, it might be allowing the now-rejected due diligence defense "to slip in through the back door." 582 F.2d at 403-04. It concluded that such concern was unwarranted, however, because of the distinction between the substantive merits of a fraud claim and the attempted release thereof, stating:

> In the substantive merits aspect of the case, it appears only fair that a plaintiff, compelled to prove that the defendant committed an intentional or reckless deception, should not also be forced to prove that he (the plaintiff) did not in any way contribute to his own harm.
>
> A totally different situation occurs, however, when we are dealing with a plaintiff who has affirmatively acted to release another party from any possible liability in connection with a transaction in securities. The mere fact that an individual has been asked to sign a release should be sufficient to put that individual on notice that a reasonable inquiry should be undertaken. No longer do we have the innocent investor sitting back and merely holding his security; we are not requiring an innocent investor *continually* to question management concerning his investment, but only to undertake a "reasonable inquiry" prior to taking the affirmative act of signing a release.

Id. at 404 (emphasis in original). The significance of this distinction will depend upon the ingenuity and subtlety with which perpetrators of securities fraud can devise means for claimants to take such affirmative action. "[T]he fundamental purpose of the 1934 Act [is] to substitute a philosophy of full disclosure for the philosophy of *caveat emptor*." *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 477 (1977) (internal quotations and citations omitted). In light of the ease with which provisions having the effect of a release can be included in transactional documents (*see* p. 13 *supra)*, the decision below effectively resurrects the philosophy of *caveat emptor*, at least for negotiated securities transactions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 00-2072

RICHARD N. MOSEMAN, an individual; DANIEL ROUSSEAU,
Plaintiffs-Appellants,

v.

BLAKE VAN LEER, an individual; GARNET, INCORPORATED; GARNET OF VIRGINIA, INCORPORATED, now known as KING GEORGE LANDFILL, INCORPORATED; GARNET OF MARYLAND, INCORPORATED; GARNET ENTERPRISES, INCORPORATED; CROSS ROAD TRAIL, INCORPORATED, ROLLINS AVENUE, INCORPORATED; KING GEORGE LAND COMPANY, INCORPORATED; BKJB PARTNERSHIP, a Georgia corporation; ROBERT D. CHEELEY, an individual; JAMES E. BUTLER, JR., an individual; BOBBY M. THOMAS, an individual; Keith R. Breedlove, an individual,
Defendants-Appellees.

June 4, 2001, Argued
August 27, 2001, Decided

OPINION

Before WILKINSON, *Chief Judge*, KING, *Circuit Judge*, and ROBERT R. BEEZER, *Senior Circuit Judge*

BEEZER, *Senior Circuit Judge*:

Richard Moseman and Daniel Rousseau appeal the district court's entry of summary judgment in favor of defendants. Plaintiffs' claims are based on common law fraud and on federal and state securities statutes. We have jurisdiction and we affirm.

Moseman, Rousseau and defendant Blake Van Leer formed a business in the mid-1980s to develop and operate refuse disposal landfill sites in Maryland and Virginia. To that end, they formed several corporations (the "Garnet corporations"), dividing the common stock of each company as follows: 50% to Moseman, 25% to Rousseau and 25% to Van Leer. In February 1995, due to the corporations' financial difficulties, Moseman, Rousseau and Van Leer transferred 25% of the issued and outstanding stock in the Garnet corporations to the BKJB Partnership[1] in exchange for a $5 million loan. According to Moseman and Rousseau, on November 20, 1995, Van Leer informed them that there was a "problem," that the King George landfill site was nearly worthless and that BKJB would not provide additional funding unless Moseman, Rousseau and Van Leer gave up another 40% of their stock together with executed proxies in favor of BKJB. The 40% stock interest was transferred. The right to vote the remaining shares was assigned to BKJB in exchange for another $1 million. These arrangements were designed to give BKJB 65% of the shares and 100% of the voting rights. The proxy documents were not executed at that time.

As the Garnet corporations' financial condition deteriorated, the principals sought a new investor or purchaser. Moseman and Rousseau allege that, around November 29, 1995, Van Leer and BKJB adopted a scheme, using "secret information" that the supposedly worthless King George landfill was actually worth $150 million.

In December, Van Leer entered into negotiations with an individual investor, William Blanchet. The agreement Van Leer negotiated provides: (1) Blanchet with 80% of the stock; (2) Van Leer with 20% of the stock; (3) Moseman with $1 million cash and a $2.55 million eight year contingent note; (4) Rousseau with a $2.412 million contingent note, a

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[1] The BKBJ Partnership is an entity formed by defendants Robert D. Cheeley, James E. Butler, Jr., Bobby M. Thomas and Keith R. Breedlove.

five year consulting agreement, lifelong health insurance, and release of a $2 million debt; and (5) BKJB with loan repayment, $6.376 million in cash, and royalties from the King George landfill. Moseman and Rousseau assert that Van Leer, BKJB and Blanchet concealed the fact that Moseman and Rousseau were to receive less consideration than that received by the remaining parties.

The Blanchet agreement was never consummated. In January 1996, before the parties signed the papers, BKJB began to negotiate a more lucrative agreement with the Sanifill Corporation. As a condition of providing ongoing financing for the projects, Sanifill required all the shareholders' proxies in order to transact corporate affairs. Because Moseman, Rousseau and Van Leer had not executed the proxies as promised in November 1995, BKJB insisted that they do so at that time. Moseman, Rousseau and Van Leer complied. The final agreement with Sanifill resulted in the following provisions: (1) Moseman received $1 million, a $2.55 million eight year contingent note and royalties from the (defunct) Rollins and Cross Road landfills; (2) Rousseau received a $2.414 million eight year contingent note, satisfaction of a $2 million debt, a weekly consulting salary and health insurance; (3) Van Leer received $2 million in cash, repayment of $675,000 owed him by one of the Garnet corporations and royalties from the King George landfill; and (4) BKJB received $6 million in cash, repayment of its loans to the Garnet corporations and royalties from the King George landfill. Before accepting the proposed agreement, Moseman asked what consideration Van Leer (but not Rousseau or BKJB) would receive. Moseman then signed a release of all claims specifically disclaiming any reliance on representations by any other party to the transaction. Rousseau signed a materially identical release after declining to be represented by counsel and stating that he would be satisfied if he received the same terms under the Sanifill deal as he would have obtained from Blanchet. He declined to

make any further inquiries with respect to any other parties' negotiated consideration.

Several months after the agreement was consummated, Moseman and Rousseau first learned that the total consideration supporting the Sanifill transaction was $32 million. This action was initiated against Van Leer, the Garnet corporations, the BKJB Partnership and individual defendants Cheeley, Butler, Thomas and Breedlove. Defendants moved for summary judgment, which the district court granted.

I

Moseman and Rousseau allege that Van Leer's representation that the King George landfill was virtually worthless fraudulently induced them to dilute their ownership position in the Garnet corporations. Consequently, according to Moseman and Rousseau, they owned a smaller percentage interest in the Garnet corporations at the time of the Sanifill transaction than they would have absent Van Leer's alleged fraud. This diminished ownership interest resulted in Moseman and Rousseau receiving less consideration from Sanifill than they believe they should have received. Moseman and Rousseau also claim that Van Leer fraudulently led them to believe that the total value of the Sanifill transaction was lower than it actually was, thus preventing them from negotiating a more lucrative agreement for themselves.

The parties dispute whether negligence is the appropriate standard by which to measure justifiable reliance on Van Leer's factual representations. If the plaintiffs justifiably relied on a misrepresentation, they may rescind the releases and go forward with their claims. *Snyder v. Herbert Greenbaum and Assocs., Inc.*, 38 Md. App. 144, 380 A.2d 618, 621 (Md. App. 1977).[2]

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[2] Maryland law controls the interpretation of the releases in this diversity case.

The district court correctly held Moseman and Rousseau to a negligence, rather than a recklessness, standard in determining the justifiability of their reliance on Van Leer's statements. A party is justified in relying on another's factual assertions unless, "under the circumstances, the facts should be apparent to one of his knowledge and intelligence from a cursory glance or he has discovered something which should serve as a warning that he is being deceived, that he is required to make an investigation of his own." *Gross v. Sussex Inc.*, 332 Md. 247, 630 A.2d 1156, 1166 (Md. 1993). Negligence is the yardstick by which the Maryland courts measure justifiable reliance. *Dep't of Gen. Svcs. v. Harmans Assocs. Ltd. P'ship*, 98 Md. App. 535, 633 A.2d 939, 947 (Md. App. 1993) (in claim for equitable adjustment, question was whether reliance on representation with respect to conditions was "reasonable"). If the factual context would prompt a reasonable person to initiate a further investigation into the details of a proposed agreement, then failure to inquire would render any reliance unjustifiable and not a ground to rescind the release.

The district court also correctly concluded that, under a negligence standard, neither Moseman nor Rousseau justifiably relied on Van Leer's representations. First, both Moseman and Rousseau explicitly eschewed relying on any such representation when they signed the releases. Second, Moseman's attorney admitted in a deposition that he was suspicious that Van Leer was withholding information, but did not press further. Third, Moseman and Rousseau failed to inquire further of any of the parties to the transaction when full information was not forthcoming from Van Leer, despite the fact that there were no impediments to them doing so.

II

Moseman and Rousseau next assert that the releases they signed are void under federal and state securities laws. *See* 15 U.S.C. § 78cc(a) (2000) ("Any condition, stipulation, or

provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void."); Md. Code Ann., Corps. & Ass'ns. § 11-703(h) (2000) ("Any condition, stipulation, or provision binding any person acquiring any security or asset or receiving any investment advice to waive compliance with any provision of this title or any rule or order under this title is void.").

Maryland courts examine federal case law when interpreting state securities statutes which, like section 11-703(h), are worded similarly to their federal counterparts. *Cf. Baker, Watts & Co. v. Miles & Stockbridge*, 95 Md. App. 145, 620 A.2d 356, 369-70 (Md. App. 1993) ("In reaching our decision, we are aided by federal court interpretations of sections of the federal securities acts that are similar to § 11-703(c).").

The district court relied on *Goodman v. Epstein*, 582 F.2d 388 (7th Cir. 1978), to support its holding that despite the strong language of 15 U.S.C. § 78cc(a), "a release may be valid as to mature, ripened claims of which the releasing party had knowledge before signing the release," and that a party would be charged with "knowledge" of those claims that he or she could have discovered upon "reasonable inquiry." Moseman and Rousseau argue that the Goodman "reasonable inquiry" standard is result-oriented and inconsistent with the general disfavor in which securities law holds releases. *See, e.g., Fox v. Kane-Miller Corp.*, 398 F. Supp. 609, 624 (D. Md. 1975), *aff'd*, 542 F.2d 915 (4th Cir. 1976) (release defense held in "very strong disfavor" in securities cases). Instead, they assert, the district court should have employed the "actual knowledge" test used by the Ninth Circuit. *See Burgess v. Premier Corp.*, 727 F.2d 826, 831 (9th

Cir. 1984) ("A release is valid for purposes of federal securities claims only if the [plaintiffs] had 'actual knowledge' that such claims existed.").

We are not aware of Fourth Circuit or Maryland case law that addresses the release issue. We conclude that the Goodman "reasonable inquiry" standard, rather than the Burgess "actual knowledge" test, sufficiently meets the purposes of the Securities Act when a release is given as bargained for consideration.

We note that Burgess relies on *Royal Air Properties, Inc. v. Smith,* 333 F.2d 568 (9th Cir. 1964). Royal Air does not involve a signed release at all, but rather an implicit waiver of the right to sue. In fact, the Royal Air court specifically observes that waiver is "unilaterally accomplished." *Id.* at 570. In contrast, the release we consider is bargained-for. This distinction is dispositive:

> The mere fact that an individual has been asked to sign a release should be sufficient to put that individual on notice that a reasonable inquiry should be undertaken. No longer do we have the innocent investor sitting back and merely holding his security; we are not requiring an innocent investor continually to question management concerning his investment, but only to undertake a "reasonable inquiry" prior to taking the affirmative act of signing a release.
>
> . . . .
>
> The requirement that a person exercise reasonable inquiry to discover possible matured claims existing at the time of execution of a [release] does nothing to defeat the general policy against the in futuro waiver of securities claims. Quite to the contrary, it insures that the signing of a release is something that will not be undertaken lightly, with the expectation that the [release]

> will be unenforceable . . . because the party executing [it] kept his eyes closed, and therefore did not "know."

Goodman, 582 F.2d at 404 (citation omitted) (drawing distinction between securities fraud cases involving implied waiver or "due diligence" defense and those involving a signed release).[3]

The district court correctly concluded that neither Moseman nor Rousseau conducted a reasonable inquiry with respect to whether they had claims against Van Leer. Despite the fact that they were asked to sign releases, neither of them inquired further (whether to Van Leer or any other party to the transaction) into the total value of the transaction, the value of the consideration the others received, or any other matter. Furthermore, Moseman's attorney failed to act upon the suspicions that his client was not being treated fairly. Moseman signed the release anyway. The releases Moseman and Rousseau voluntarily signed bar their claims.

AFFIRMED

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[3] *See* also *Petro-Ventures, Inc. v. Takessian*, 967 F.2d 1337, 1342 (9th Cir. 1992) (in case holding that section 78cc(a)'s anti-waiver provision did not bar release signed in context of ongoing litigation, noting distinction between unilateral waiver and release which was "the result of negotiations between parties of equal bargaining power" but explicitly declining to decide the issue of reasonable inquiry raised in Goodman). *Cf. Jadoff v. Gleason*, 140 F.R.D. 330, 333-34 (M.D.N.C. 1991) (citing Goodman and *American Gen. Ins. Co. v. Equitable Gen. Corp.*, 493 F. Supp. 721, 751 (E.D. Va. 1980), for the "reasonable discovery" standard, but voiding release because the document in question "stated only a belief as to the receipt of information" and therefore would not have put the plaintiff on notice to inquire).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. WMN-98-434

RICHARD N. MOSEMAN, *et al.*

v.

BLAKE VAN LEER, *et al.*

MEMORANDUM

Before the Court are the following motions: Plaintiff Moseman's Motion for Summary Judgment (Paper No. 78); Defendants BKJB Partnership, Cheely, Butler, Thomas, and Breedlove's (collectively the "BKJB Defendants") Motions for Summary Judgment against Moseman (Paper No. 79) and Rousseau (Paper No. 80); Defendants Van Leer, Garnet Inc., Garnet Enterprises, Inc. ("Garnet-Ent."), Cross Road Trail, Inc. ("Cross Road"), Rollins Avenue, Inc. ("Rollins"), and King George Land Co. Inc.'s ("King George") Motion for Summary Judgment (Paper No. 81); and Defendants Garnet of Virginia, Inc. ("Garnet-VA"), and Garnet of Maryland, Inc.'s ("Garnet-MD") Motion for Summary Judgment (Paper No. 82). The motions are ripe for decision. Upon a review of the motions and the applicable case law, the Court determines that no hearing is necessary (Local Rule 105.6) and that all Defendants' motions will be granted and Plaintiff's motion will be denied as moot.

I. BACKGROUND

Plaintiffs Moseman and Rousseau have brought the instant suit against Defendants Van Leer, the BKJB Defendants, and

the above named corporate entities. The case arises out of an alleged fraudulent representation regarding the sale of stock. Plaintiffs maintain that Van Leer failed to inform them of the price which Sanifill, Inc. would pay Van Leer and the BKJB Defendants for their stock in the Garnet companies. Plaintiffs claim that Van Leer misled them and induced them to agree to a pre-sale redemption of their stock at a substantially lower price then they would have received had they known of the sale price. Plaintiffs allege that Van Leer and the BKJB Defendants received a substantial economic profit from Plaintiffs' pre-sale redemption of their shares.

Plaintiffs bring this action under the following theories of liability: securities fraud under 15 U.S.C. § 78j (Count I); securities violation under 15 U.S.C. § 78t(a) (Count II); primary and controlling party liability under the Maryland Securities Act, Md. Corps. and Assocs. § 11-703(a)(2) (Count III); common law fraud and deceit (Count IV); civil conspiracy (Count V); negligent misrepresentation (Count VI); agency (Count VII); and aiding and abetting (Count VIII).

Defendants have moved, separately, for summary judgment on all of Plaintiffs' claims, arguing, inter alia, that Plaintiffs' claims are barred by mutual releases signed by both Rousseau and Moseman.[1]

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[1] The Court agrees with Defendants that the mutual releases bar Plaintiffs' claims and, therefore, it need not reach Defendants' remaining grounds for summary judgment. In addition, with respect to Plaintiff Moseman's pending motion for summary judgment on Defendants Van Leer and the Garnet Entities' counterclaims, the counterclaims of breach of contract and conversion were conditionally asserted in the event that the releases were rescinded. In light of the Court's conclusion that Defendants are entitled to summary judgment because Plaintiffs' claims are barred by the mutual releases, Moseman's motion is moot and will be denied.

A. Facts

It is useful to outline the history of events in this factually heavy-laden case. Moseman is the former sole owner of a construction company, Moseman Construction. Van Leer and Rousseau were employed by Moseman until 1985, when the company was sold. Beginning in 1985, Moseman provided initial capital to start new businesses with Rousseau and Van Leer. Relevant to this action, Moseman invested capital in seven new companies, each having the primary purpose of purchasing, developing, and operating landfills in Maryland and Virginia: Garnet, Inc.,[2] Garnet-VA, Garnet-MD, Garnet-Ent., King George, Cross Road, and Rollins. The stock in these companies was divided 50% to Moseman and 25% each to Van Leer and Rousseau. Moseman, Rousseau, and Van Leer all served as officers and directors of the Garnet companies. Van Leer was the chief executive officer of each corporation and responsible for maintaining the day to day operations of the companies. Rousseau was to provide engineering support and Moseman agreed to provide financing.

Garnet-VA was formed in 1991 by Plaintiffs and Van Leer for the purpose of developing a landfill in King George County, Virginia. Rousseau and Van Leer expected Moseman to provide money to finance the necessary permitting, land purchases, and construction of the landfill. Moseman made initial loans to Cross Road and Rollins but was unable to provide any funding to Garnet-VA by 1993. Instead,

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[2] Garnet, Inc., a construction company, was started by Rousseau and Van Leer for the purpose of obtaining the construction contracts to build the landfills. Unlike the remaining corporations, Moseman could not join Garnet, Inc., or serve as a director because of a noncompetition agreement. Moseman did, however, loan Rousseau $100,000 to help secure bonding for Garnet, Inc.

Moseman arranged for Beton Leasing to make a $5 million loan to Garnet-VA.[3]

In early 1995, the corporations began to experience critical cash shortfalls. Moseman was also experiencing cash shortfalls and was not able to arrange third party financing for the corporations. BKJB loaned $5 million to Garnet-VA in February 1995 in return for a one year promissory note and the transfer of 25% of the stock in Garnet-VA, Garnet-MD, and Garnet-Ent. from Moseman to the BKJB partners. Garnet-VA was in need of money again in the Fall of 1995; most immediately, it needed $1 million for tax-exempt bonds.[4] Garnet-VA, Moseman, Rousseau, and Van Leer did not have the necessary funds. BKJB provided the funds in exchange for 40% of the stock in Garnet-VA, Garnet-MD, and Garnet-Ent. and an agreement by Moseman, Rousseau, and Van Leer to allow BKJB to vote their remaining shares of stock in the corporations. This offer was accepted and memorialized on November 21, 1995. The voting proxies were not executed at this time. The end result was that BKJB owned 65% of the shares and 100% of the voting proxies in Garnet-VA, Garnet-MD, and Garnet-Ent.

1. Blanchet Negotiations

At the end of November 1995, Garnet-VA's financial needs necessitated looking for new investors or purchasers for the landfill. The corporation needed $6 million to purchase property, $3 million to pay off existing debts, and several million dollars to construct the landfill. Moseman was also experiencing financial pressures at that time because his

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[3] Defendants claim that Moseman began withdrawing money from Garnet-VA as interest payments on loans he made to Cross Road. This alleged diversion of funds and other concerns about the Beton Leasing loan became a great source of strained relations between Van Leer and Moseman.

[4] Plaintiffs dispute the state of the bond offerings at the time.

7,500 acre ranch in Redding, California was facing an imminent sheriff's sale unless he could come up with $1 million to pay his mortgage. Van Leer, as president of Garnet-VA, Garnet-MD, and Garnet-Ent., negotiated with an investor, William Blanchet, during December 1995.[5] Each individual shareholder negotiated different agreements with Blanchet. If the Blanchet transaction had been completed, its terms would have included redemption of all stock owned by Plaintiffs and BKJB. Van Leer would have retained 100% control and ownership of Garnet, Inc., and a 20% interest in the remaining corporations, with Blanchet taking the remaining 80% of the stock. The total loans from Blanchet would have amounted to $14 million. Moseman would have received $1 million cash, $2.55 million paid over eight years after repayment of the Beton Leasing Debt,[6] and royalties on the deposits at the Rollins landfill. Rousseau would have received $2.412 million paid over eight years beginning after the repayment of the Beton Leasing debt, a five year consulting agreement providing for weekly compensation, health benefits for life, and release of his $2 million obligation to Beton Leasing. BKJB would have received repayment of their loans with interest, $6.376 million, and royalties from the King George landfill. Plaintiffs maintain that they were unaware of this royalties term.

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[5] Plaintiffs claim that BKJB and Van Leer held a "secret meeting," unbeknownst to Moseman or Rousseau, on November 29, 1995, where they discussed, among other things, the value of the corporation. Plaintiffs assert that the offering package that was sent out just days after this meeting appraised a built value on the landfill of $69 million. Plaintiffs neglect to mention that the offering also stated that $45 million in funding was needed to construct and open the project.

[6] Blanchet would have satisfied the Beton Leasing obligation between five and six years after the landfill opened for operation.

The Blanchet transaction was never consummated. Garnet-VA continued to communicate with other possible investors and purchasers. In January 1996, negotiations began with Sanifill, Inc.

2. The Sanifill Transaction

BKJB partners Cheely, Thomas, and Breedlove met with Sanifill representatives in early January 1996 to negotiate a short term $10 million loan to Garnet-VA. As security for the loan, Sanifill required a pledge of all the shares of stock in Garnet-VA, Garnet-MD, and Garnet-Ent., as well as subordination of BKJB's $5 million note which was scheduled to mature on February 7, 1996. To meet this requirement, Sanifill required the production of voting proxies for Moseman, Rousseau, and Van Leer. BKJB demanded that Moseman, Van Leer, and Rousseau execute the voting proxies which they had promised to execute in November 1995. Plaintiffs were sent a letter by BKJB's attorney on January 4, 1996, stating that if they did not sign the proxies, the partnership would institute legal proceedings for specific performance if necessary. Moseman, Rousseau, and Van Leer all complied by signing the proxies. On January 5, 1996, a letter of intent between Garnet-VA and Sanifill was executed, imposing a no-shop restriction on Garnet-VA, whereby it was required to negotiate exclusively and in good faith with Sanifill until January 31, 1996.

BKJB claims that it understood that each shareholder, as with the Blanchet transaction, was responsible for negotiating his own deal with Sanifill. Once the transaction was finalized on February 2, 1996, BKJB received a $6 million payment in cash for its interest in Garnet-VA, Garnet-MD, and Garnet-Ent., a $6.375 million repayment of its loans to Garnet-VA, and would receive royalties on waste deposited at the King George landfill. Van Leer received a $2 million cash payment, repayment of his $675,000 in obligations owed him by Garnet-VA, and royalties from the operation of the King

George landfill. Moseman received $1 million in cash, a $2.55 million promissory note payable over eight years, and royalties from the Cross Road and Rollins landfills. Rousseau received a $2.414 million promissory note payable over eight years, satisfaction of his $2 million Beton Leasing obligation, a weekly consulting salary, and health insurance. Sanifill was also assuming Garnet-VA's existing debts and obligations, totaling more than $10 million.

a. Moseman

Before Moseman signed a letter redemption agreement on January 9, 1996, Moseman's counsel, Andrew Shafer, represented to Van Leer that Moseman would be content with terms similar to that of the Blanchet transaction. Shafer did attempt, however, to negotiate with Van Leer for more compensation from Sanifill for Moseman. Moseman sought to increase the amount of his deferred payments from $2.55 million to $3 million and to obtain a personal guaranty of the deferred payments by Van Leer, and royalties from both Cross Road and Rollins. After many days of negotiations between Moseman and Van Leer, Moseman agreed to redeem his stock, as stated above, in exchange for $1 million cash to be paid on January 10, 1996, $2.55 million to be paid over eight years beginning after the satisfaction of the Beton Leasing obligation,[7] and royalties from the Cross Road and Rollins landfills. Moseman was wired the $1 million in time to save his cattle ranch.

Before Moseman signed the letter redemption agreement, his attorney, Andrew Shafer asked Barry Levin, the outside corporate counsel for the Garnet companies, for a copy of the underlying transaction documents, particularly to find out

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[7] Unlike the Blanchet terms, Sanifill agreed to repay the Beton Leasing obligation upon closing with Garnet-VA in February 1996. Therefore, Moseman's note was to be repaid at least six years earlier by Sanifill than it would have by Blanchet.

what Van Leer was receiving. Levin told Shafer that Van Leer directed Levin not to disclose the documents to Shafer or Moseman.[8] Levin indicated that all Moseman needed to know was that Garnet-VA and Garnet-MD had negative net worth and Moseman would get $3.55 million despite this fact. Levin indicated that the Sanifill transaction was not materially different from the Blanchet terms.

Before signing a mutual release on January 24, 1996, Moseman and his counsel again made efforts to ascertain what Van Leer would be receiving from the deal. Shafer was told by Levin that Van Leer would be receiving less cash up front than Moseman.[9] In addition, Shafer understood that Van Leer would receive deferred payments based on the operations of the King George County landfill. Plaintiffs claim, in their Second Amended Complaint, that Levin indicated that the total Van Leer would receive in deferred payments might be more than what Plaintiffs would receive in redemption of their shares but that the amount would not be substantial. Moseman and Shafer claim that at the time Moseman signed the release, they believed the transaction

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[8] Plaintiffs' argue that Levin told Shafer there were no documents to look at as they were in the process of being negotiated. Plaintiffs' Opposition at 26. The relevant portion of Shafer's Deposition to which Plaintiffs cite, however, clearly indicates that Levin told Shafer that he was under instructions not to discuss any of the aspects of the transaction. Plaintiffs' Opposition, Exh. 69 at 195-96. Shafer did not testify that Levin told him the documents did not exist.

[9] It is unclear precisely how much Moseman and Shafer understood that Van Leer would receive in cash up front. In his declaration, Shafer indicates that he was told that Van Leer would receive no cash up front. In Plaintiffs' Second Amended Complaint, however, Moseman claims that he understood that Van Leer simply would not receive as much cash up front as Moseman; rather, Van Leer was getting just enough cash to pay his debts.

was worth approximately $10 million.[10] At no time did Moseman request information about BKJB's compensation. He also did not make any efforts to obtain information from BKJB or Sanifill nor did he claim that he was being denied information. Moseman did inquire as to what Rousseau was receiving and Rousseau provided him with this information.

Garnet-VA requested on January 23, 1996, that Moseman complete his obligation by executing a mutual release and providing his resignation as officer and director of the Garnet companies. Moseman, represented by Shafer, signed the release on January 24, 1996, after making changes to some of its terms. Moseman agreed to release Van Leer, BKJB, Garnet-VA, Garnet-MD, Garnet-Ent., Garnet, Inc., Cross Road, Rollins, and King George "from all and every manner of action and actions, cause and causes of action, suits, . . . that Moseman ever had, now has, or may hereafter have, directly or indirectly, for, upon or by reason of any matter, cause or thing whatsoever, arising from the beginning of time to the date of execution of this Mutual Release. . . ." BKJB Defendants' Motion against Moseman, Exh. 1, ¶ 1. Moseman acknowledged that he "voluntarily entered into this Mutual Release without duress or compulsion," of his own "free will," and after reviewing the terms with his "advisors and attorneys before signing this Mutual Release." *Id.* at ¶ 3. Furthermore, Moseman acknowledged that he was not "relying upon any representation, oral or written, made by the other parties, or any of them, or their agents or representatives." *Id.* Despite this release, Moseman now maintains that he believed that he could trust Van Leer and relied on Van Leer's representations.

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[10] Plaintiffs now claim that Levin informed Shafer that the new transaction was not materially different than the Blanchet terms except that Sanifill was going to *also* make a $10 million loan.

After receiving the first payment on the promissory note, Moseman sold it back to Sanifill for a discounted amount of $1.2 million. He signed a second mutual release on July 25, 1996, where he similarly released Sanifill, Sanifill of Virginia, Inc., Sanifill of Maryland, Inc., Garnet-VA, and Garnet-MD from any actions, causes of action, or suit. The second release differed from the first in that language was included stating that the release did not constitute a waiver or release of any claim that any of the parties may have against Van Leer.

b. Rousseau

Rousseau, who chose not to be represented by counsel, stated that he understood that no single shareholder was representing the interests of the others; rather, it was "every man for himself." Van Leer, *et al.*'s Motion, Exh. F at ¶ 3. Rousseau indicated to Van Leer that he would be satisfied with the same terms as in the Blanchet negotiations. Rousseau claims that Van Leer told him that what he would get from Sanifill was fair, reasonable, and the best deal Rousseau could expect. Rousseau claims that he did not know that royalties were a possible term based on a statement that Van Leer made one year prior to these negotiations. There is no further evidence of any inquiries made by Rousseau as to what other shareholders were receiving or as to other possible terms for his own agreement. On January 3, 1996, Rousseau signed a letter redemption agreement and mutual release. The terms of the release were materially the same as that signed by Moseman.

3. Subsequent Proceedings

Moseman claims he did not learn that Sanifill paid more than $10 million for the Garnet companies until September 1997 when he obtained tax return information indicating that the Sanifill transaction had been for $32 million. Plaintiffs claim that they were not aware of the exact terms of the

transaction until this litigation began, when they first saw the January 5, 1996 letter of intent. Plaintiffs now claim that they are entitled to proportionate shares based on the percentage of their stock ownership in the corporations at the time Sanifill paid consideration, including a proportionate share of royalty payments. Plaintiffs maintain that they were unaware that Van Leer and BKJB would receive substantial cash payments and a royalty stream.

II. ANALYSIS

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to summary judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A party seeking summary judgment bears the initial responsibility of informing the court of the basis of its motion and identifying the portions of the opposing party's case which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). When considering the motion, the court assumes that all of the non-moving party's evidence is worthy of belief and justifiable inferences are drawn in favor of the non-moving party. *Anderson*, 477 U.S. at 252. If the movant demonstrates there is no genuine issue of material fact and that he is entitled to summary judgment as a matter of law, the non-moving party must, in order to withstand the motion for summary judgment, produce sufficient evidence in the form of depositions, affidavits or other documentation which demonstrates that a triable issue of fact exists for trial. *Celotex*, 477 U.S. at 324.

The Court first considers Defendants' arguments that the mutual releases bar Plaintiffs' present claims. Plaintiffs maintain that the releases are invalid because they were procured by fraud as to both Plaintiffs and under duress as to

Moseman. In addition, Plaintiffs assert that the releases are invalidated by federal and Maryland securities law.

Releases are contractual and are therefore governed by ordinary contract principles. *Chicago Title Ins. Co. v. Lumbermen's Mut. Cas. Co.*, 120 Md. App. 538, 548 (1998). Ordinarily, "a defense based upon a release is complete." *Parish v. Maryland and Virginia Milk Producers Assoc., Inc.*, 250 Md. 24, 101 (1968), *cert. denied*, 404 U.S. 940 (1971). Nonetheless, releases, like contracts, may be rescinded on a finding of fraud, duress, undue influence, or negligent misrepresentation in their making. *Hale v. Hale*, 66 Md. App. 228, 233, *cert. denied*, 306 Md. 118 (1986) (grounds upon which a contract may be rescinded); *Parish*, 250 Md. at 101-02. The burden of proof required of a plaintiff attacking the validity of a release in order to have it set aside is "arduous." *Gingell v. Backus*, 246 Md. 83, 90 (1967). A party who executes a release without coercion or undue persuasion cannot impeach its validity on the ground of his own carelessness where, at the time of its execution, he might have advised himself more fully as to the nature and legal effect of the act he was performing. *Gingell*, 246 Md. at 89 (citing *Spitze v. Baltimore & O.R. Co.*, 75 Md. 162, 170-71 (1892)).

A. Fraudulent Inducement

In order to rescind a contract or release entered into based on misrepresentations: (1) the representations must have been false, (2) the representations must have been as to material facts, (3) the rescinding party must have relied on those representations in deciding to contract, and (4) the rescinding party must have justifiably relied on the representations. *Snyder v. Herbert Greenbaum and Assocs., Inc.*, 38 Md. App. 144, 148 (1977). A party may not claim that it relied on another's misrepresentation when it had knowledge of the falsity of that representation or had reason to believe that it was false. *Santana, Inc. v. Levi Strauss and Co.*, 674 F.2d

269, 274 (4th Cir. 1982). Similarly, a party cannot successfully claim that it justifiably relied upon omissions when it had knowledge of the non-disclosing party's failure to disclose. *Jensen v. Kimble*, 1 F.3d 1073, 1078 (10th Cir. 1993).

1. Moseman

Moseman is unable to rescind the January 24, 1996 mutual release because the facts clearly indicate that he did not justifiably rely on the alleged misrepresentations of Van Leer.

First, Moseman signed the release stating that he had done so voluntarily and without relying on any representation by any of the other parties. *See Manufacturers Hanover Trust Co. v. Yanakas*, 7 F.3d 310, 315-16 (2nd Cir. 1993) (when "the contract states that a contracting party disclaims the existence of or reliance upon specified representations, that party will not be allowed to claim that he was defrauded into entering the contract in reliance on those representations").[11] Moseman is a sophisticated and successful businessman who signed the release when represented by counsel. In fact, Shafer suggested modifications to the language of the release, clarifying that Moseman's only objection to its language concerned adding a provision that would preserve rights to certain debts of Cross Road, Rollins, and Van Leer personally. *See Mergens v. Dreyfoos*, 166 F.3d 1114, 1118 (11th Cir.), *cert. denied*, 120 S.Ct. 63 (1999) (fact that plaintiffs were sophisticated business persons, represented by

---

[11] While it is true that a general, rather than specific, clause stating that no representations were relied upon may be ineffective to rescind a release, it does not necessarily apply in this circumstance. Rather, it is more important for the substance of the disclaimers to track the substance of the alleged misrepresentations. *Manufacturers Hanover Trust Co. v. Yanakas*, 7 F.3d 310, 316 (2nd Cir. 1993). Where, as here, the alleged misrepresentations were non-specific, a general statement that representations were not relied upon in signing the mutual release may suffice.

legal counsel, factored into the court's determination that they were not justified in relying on representations made by defendants).

Another reason that Moseman cannot be said to have justifiably relied upon the alleged misrepresentations is that he knew information was not being disclosed to him. Moseman testified in his deposition that he was aware that Levin and Van Leer had refused to give information that Moseman and Shafer requested. In addition to Levin's refusal to produce documentation, Shafer, Moseman's attorney, expressed doubt as to whether he had all information relating to the other parties' terms with Sanifill. In his deposition, Shafer testified:

> Q. Well, there was a part of you that believed that other parties to this transaction were getting a better deal than Mr. Moseman; correct?
>
> A. Well, you know, certainly you would say to yourself—well, why not. Obviously, there is some sugar going on back here and who knows what. That tied in with Levin's comment about [Van Leer] getting somewhat more than [Moseman].
>
> Q. What do you mean by "some sugar going on back here?"
>
> A. That there was something happening that they didn't want us to know. It was pretty obvious. Otherwise, why wouldn't they give us the document?
>
> Q. You recognized this at the time of the deal?
>
> A. I recognized at the time of the deal that I didn't think that they were telling me everything that there was to be told. Obviously, because they would have given me the document.

BKJB Defendants' Motion against Moseman, Exh. J at 376-77.

The strained relationship between Moseman and Van Leer dating back to the Beton Leasing loan difficulties should have also heightened Moseman's suspicions. Rousseau testified at deposition that Moseman indicated to Rousseau that he did not trust Van Leer and Rousseau believed that the relationship between Moseman and Van Leer had deteriorated. Van Leer, *et al.*'s Motion, Exh. G at 350. Moseman admits that he did not have reason to trust Van Leer as much as he deserved or would have liked. He stated that he was suspicious of Van Leer on some things "but not on major things." Van Leer, *et al.*'s Motion, Exh. D at 443-44. *See Mergens*, 166 F.3d at 1118 (fact that parties had been in an adversarial relationship since before the execution of the agreement factored into the court's determination that plaintiffs were not justified in relying on representations made by defendants).

Despite the fact that Moseman was aware that all information was not being disclosed to him, that he suspected that others might be receiving more favorable terms, and that he had a somewhat adversarial relationship with Van Leer, he did not ask BKJB or Sanifill what the other sellers were getting or make any attempt to alert BKJB or Sanifill to the fact that he was not getting certain requested information. Moseman signed the letter redemption agreement on January 9, 1996, and had two weeks in which he could have made further inquiries before signing the release.

Finally, Moseman cannot assert that he reasonably and justifiably relied on the representations made to him concerning the Sanifill transaction because the information provided to him suggested that the terms of the Sanifill transaction were not identical to the Blanchet terms. For example, Moseman knew that Sanifill was purchasing 100% of the Garnet-VA interests rather than 80% as in the Blanchet terms. Similarly, Moseman was aware that Sanifill was going to repay the $6 million Beton Leasing debt, which had not been a part of the Blanchet terms. In addition, Moseman

claims to have no knowledge of any King George landfill royalties but admits that he was told that Van Leer would receive deferred payments based on the operation of the landfill. These facts alone, coupled with the knowledge that Moseman was to receive $3.55 million and certain royalties, reflects the impossibility of the entire transaction amounting to only $10 million as Moseman suggested he initially believed.

Without addressing the veracity of the representations made to Moseman, it is apparent that the release signed by Moseman cannot be rescinded based on fraud because he did not reasonably rely on the statements made to him.[12]

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[12] The Court is unpersuaded by Moseman's argument that Defendants owed him a fiduciary duty and had a confidential relationship with him, thereby necessitating a presumption of fraud and a burden on Defendants to prove the absence of fraud, duress, and undue influence. Constructive fraud based on a confidential relationship may be found where a party is justified in believing the other party will not act in a manner inconsistent with the reposing party's interest or welfare. This confidential relationship is one where there is a relationship of trust. *Crawford v. Mindel*, 57 Md. App. 111, 120 (1984). For the reasons already stated, the undisputed evidence does not reflect a trusting relationship between Moseman and Van Leer nor is Moseman justified in believing that Van Leer would act in a manner consistent with Moseman's interest. The evidence clearly shows that in both the Blanchet and Sanifill negotiations, the parties were expected to negotiate on their own behalf.

Similarly, the argument that Van Leer, as an officer and director, owed a fiduciary duty to Moseman and therefore must prove that the representations were not fraudulent, must fail. A majority shareholder owes a fiduciary obligation to minority shareholders when the majority uses their voting power to their own benefit and for some ulterior purpose. *See Twenty Seven Trust v. Realty Growth Investors*, 533 F.Supp. 1028, 1034 (D. Md. 1980) This is not the case here. Plaintiffs do not contend that they were harmed by the fact that the Garnet corporations were sold; rather they contend that they should have received more consideration. Furthermore, an officer or director is not generally in a fiduciary relationship with an individual stockholder with respect to his stock, in the absence of actual fraud. The legality of the transaction is not affected by the failure of the purchaser to divulge information which he may have

2. Rousseau

Similarly, Rousseau is unable to rescind the mutual release that he signed on January 3, 1996, based upon alleged misrepresentations. As Moseman did, Rousseau also stated, in the language of the release, that he signed it voluntarily and without relying on any representations. As with Moseman, Rousseau is also a sophisticated business person.

The undisputed facts reveal that Rousseau told Van Leer he would be satisfied with the same terms as the Blanchet negotiations, and he got those same terms. The only representation that he claims was made to him was that what he would get from Sanifill was fair, reasonable, and the best deal he could expect. These assurances are more opinions than factual representations. In addition, Rousseau claims he did not know of the possibility of royalties. He bases this on a statement made by Van Leer at least one year before the Sanifill negotiations. The statement was made regarding the Beton Leasing loan and could not have applied to the Sanifill negotiations because they were not even contemplated at the time. Furthermore, Rousseau signed the release on January 3, 1996, the day before the terms of Van Leer's deal began to be negotiated. Rousseau cannot plausibly maintain that the possibility of royalties was withheld from him when they were not yet a possibility.

Finally, Rousseau cannot establish that he relied on misrepresentations in signing the release because he did not know the terms of anyone else's deal, did not ask for such information, and, moreover, he stated that he believed that the state of the negotiations was to be "every man for himself." Accordingly, the mutual release signed by Rousseau cannot be invalidated based on fraudulent misrepresentations.

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concerning the value of the stock. *Goodman v. Poland*, 395 F.Supp. 660, 680 (D. Md. 1975).

B. Duress

Moseman argues that the January 24, 1996 release is invalid because it was executed under duress. He bases his claim on the fact that Defendants were aware of his dire financial situation regarding his ranch home and also threatened him with a lawsuit. In order to establish a duress claim there must be: (1) a wrongful act or threat, (2) financial distress caused by the wrongful act or threats, and (3) absence of any reasonable alternative to the terms presented by the wrongdoer. *Brock v. Entre Computer Ctrs., Inc.*, 933 F.2d 1253, 1260 (4th Cir. 1991). *See also Eckstein v. Eckstein*, 38 Md. App. 506, 512 (1978) (to establish duress, there must be a wrongful act which deprives an individual of the exercise of his free will).

Regarding Moseman's financial situation with his ranch home, his claim of duress cannot succeed to void the release because Moseman has failed to allege a necessary element of a duress claim—causation. Moseman does not suggest, and the undisputed facts do not reflect, that Moseman's economic distress was caused by any actions of Defendants. In fact, the foreclosure on Moseman's ranch and threatened sheriff's sale were a result of Moseman's participation in a separate construction operation that failed. The law is well settled that mere stress of business does not constitute duress. *Shillman v. Hobstetter*, 249 Md. 678, 693 (1968). Furthermore, by the time Moseman signed the release on January 24, 1996, he received the $1 million two weeks earlier, and was no longer under the financial pressure.

Moseman also contends that BKJB threatened him with legal action, thus constituting duress to sign the release. Moseman claims that the Defendants threatened to call in their loans. The supporting documents, however, reveal only that BKJB sought to enforce the voting proxy agreement which was entered into in November 1995. There is no legally sufficient basis for duress where the threat to sue is

made in good faith. *Bell v. Bell*, 38 Md. App. 10, 16 (1977), *cert. denied*, 282 Md. 729 (1978). A bad faith threat to sue occurs where the assertion of the claim is made with the knowledge that there is no reasonable belief of success or that it is false. *Id.* This is not the case at present. Moseman does not dispute the validity of Defendants' claim to enforce the agreement. Furthermore, Moseman was asked to sign the voting proxies and did so in early January, long before the signing of the release. The threat of legal action was no longer present. Moseman's arguments for rescinding the release based on economic duress must fail as a matter of law.

C. Federal and Maryland Securities Law

Finally, Plaintiffs assert that the releases are void under federal and Maryland securities law. Both the federal and state securities acts contain provisions which state that any provision binding a person to waive compliance with the securities law is void. 15 U.S.C. § 78cc(a); Md. Corps. & Assocs., § 11-703(h). Generally, the defense of release is viewed with disfavor in securities cases. *Fox v. Kane-Miller Corp.*, 398 F.Supp. 609, 624 (D. Md. 1975), *aff'd*, 542 F.2d 915 (4th Cir. 1976). These statutory provisions have been interpreted, however, to only bar anticipatory waivers of compliance with securities laws. A release may be valid as to mature, ripened claims of which the releasing party had knowledge before signing the release. *Goodman v. Epstein*, 582 F.2d 388, 402 (7th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979). A securities fraud claim is said to be ripe at the time the investor enters into a transaction, relying on material misrepresentations. *Solano v. Delmed, Inc.*, 759 F.Supp. 847, 854 (D.C. Cir. 1991) (determining when claim was ripe for purpose of statute of limitations). A releasing party has knowledge of existing claims when he has actual knowledge or should have had knowledge upon a reasonable inquiry. *Goodman*, 582 F.2d at 404. "The mere fact that an individual has been asked to sign a release should be sufficient to put

that individual on notice that a reasonable inquiry should be undertaken." *Id.* What constitutes reasonable inquiry will differ from situation to situation. *Id.*

This requirement of reasonable inquiry insures that "the signing of a waiver is something that will not be undertaken lightly, with the expectation that the waiver will be unenforceable even as to existing claims because the party executing the waiver kept his eyes closed, and therefore did not 'know.'" *Id.* In addition, such a reasonable inquiry favors the honest settlement of claims which is recognized as essential to the continued functioning of the judicial system. *Id.*

With respect to both Moseman and Rousseau, any securities claims that they might have were ripe at the time they signed the mutual release. They both entered the transaction, allegedly relying on Defendants' material misrepresentations. The question is whether they had reason to have knowledge of the alleged securities violations; i.e., whether they conducted a reasonable inquiry. Both were put on notice of the need for an inquiry simply by virtue of being asked to sign mutual releases. In addition, as discussed above, Moseman was alerted by several factors that he was not receiving all desired information about the Sanifill transaction. Nonetheless, he did not ask BKJB or Sanifill about the terms of the transaction. Moseman's signing of the release cannot be said to be an anticipatory waiver. The release only applied to the claims which had already arisen based on the representations which he claims he relied upon. He did not waive any future claims regarding continuing or future compliance with securities laws. Similarly, Rousseau cannot be deemed to have conducted a reasonable inquiry. He made no inquiries of Moseman, Van Leer, BKJB, or Sanifill as to the terms of the transaction, despite the fact that he was asked to sign a release. Accordingly, as a matter of law, neither Moseman or Rousseau are able to void their signed releases.

III. CONCLUSION

For the foregoing reasons, all Defendants' Motions for Summary Judgment will be granted and Plaintiff Moseman's Motion for Summary Judgment will be denied as moot. Plaintiffs' claims in their Second Amended Complaint are barred by their mutual releases and, therefore, must be dismissed. A separate order will issue.

/s/ William M. Nickerson
WILLIAM M. NICKERSON
United States District Judge

Dated: March 30, 2000

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. WMN-98-434

RICHARD N. MOSEMAN, *et al.*

v.

BLAKE VAN LEER, *et al.*

ORDER

Pursuant to the foregoing memorandum, and for the reasons stated therein, IT IS this 30th day of March, 2000, by the United States District Court for the District of Maryland, hereby ORDERED:

1. That Plaintiff Moseman's Motion for Summary Judgment (Paper No. 78) is hereby DENIED as MOOT;

2. Defendants BKJB Partnership, Cheely, Butler, Thomas, and Breedlove's Motion for Summary Judgment against Moseman (Paper No. 79) is hereby GRANTED;

3. Defendants BKJB Partnership, Cheely, Butler, Thomas, and Breedlove's Motion for Summary Judgment against Rousseau (Paper No. 80) is hereby GRANTED;

4. Defendants Van Leer, Garnet Inc., Garnet Enterprises, Inc., Cross Road Trail, Inc., Rollins Avenue, Inc., and King George Land Co., Inc.'s Motion for Summary Judgment (Paper No. 81) is hereby GRANTED;

5. Defendants Garnet of Virginia, Inc., and Garnet of Maryland, Inc.'s Motion for Summary Judgment (Paper No. 82) is hereby GRANTED;

6. That this action is hereby CLOSED;

7. That any and all prior rulings made by this Court disposing of any claims against any parties are incorporated by reference herein and this order shall be deemed to be a final judgment within the meaning of Fed. R. Civ. P. 58; and

8. That the Clerk of the Court shall mail or transmit copies of the foregoing memorandum and this order to all counsel of record.

/s/ William M. Nickerson
WILLIAM M. NICKERSON
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

00-2072

August 27, 2001

NOTICE OF JUDGMENT

Judgment was entered this date in Case Number(s): 00-2072

The Court's decision is enclosed.

PETITION FOR REHEARING (FRAP 40)
PETITION FOR REHEARING EN BANC (FRAP 35)

Filing Time

A petition must be received in the clerk's office within 14 days after judgment to be timely. There are three exceptions to this rule:

(1) In all civil cases in which the United States or an agency or officer thereof is a party, the time within which a party may seek rehearing shall be 45 days after entry of judgment.

(2) The Court may grant an extension of time or leave to file a petition for rehearing out of time if the party establishes that the delay resulted from the death or serious illness of counsel or a family member (or of a party or family member in pro se cases) or other circumstances wholly beyond the control of counsel or a party proceeding without counsel.

(3) Prisoner petitions are deemed filed when delivered to prison authorities.

If a petition for rehearing en banc is to be filed, it must be filed at the same time and in the same document as the petition for rehearing and must be clearly identified in the title.

Each case number to which the petition applies must be listed on the petition, even in companion or consolidated cases. Failure to list the individual case numbers on the petition will result in the unidentified cases proceeding to mandate even if a timely petition for rehearing has been filed in a companion or consolidated case.

A timely filed petition for rehearing or petition for rehearing en banc will stay the mandate and toll the running of time for filing a petition for writ of certiorari.

Purpose

A petition should only be made to direct the Court's attention to one or more of the following situations:

1. A material fact or law overlooked in the decision.

2. A change in the law which occurred after the case was submitted and which was overlooked by the panel.

3. The opinion is in conflict with a decision of the United States Supreme Court, this Court, or another court of appeals, and the conflict is not addressed in the opinion.

4. The proceeding involves one or more questions of exceptional importance.

Statement of Counsel

A petition shall contain an introduction stating that, in counsel's judgment, one or more of the situations exist as described in the above "Purpose" section. The points to be raised shall be succinctly listed in the statement.

Form

The 15 page limit allowed by the Rule shall be observed. The Court requires 4 copies of the petition (20 copies of a petition for rehearing en banc); however, a pro se party who is indigent may file the original only.

BILL OF COSTS (FRAP 39)

Filing Time

A party to whom costs are allowed, who desires taxation of costs, shall file a bill of costs on or before 09/10/01.

MANDATE (FRAP 41)

Issuance Time

Except in original proceedings before this Court when there is no mandate, the mandate is issued 7 days after the expiration of the time for filing a petition for rehearing. A timely petition for rehearing, petition for rehearing en banc, or motion to stay the mandate will stay the issuance. If the petition or motion is denied, the mandate will issue 7 days later. If a stay of mandate is sought, only the original of a motion need be filed.

Stay

A motion for stay of the issuance of the mandate shall not be granted simply upon request. Ordinarily the motion will be denied unless it would not be frivolous or filed merely for delay and would present a substantial question or otherwise set forth good or probable cause for a stay.

CRIMINAL JUSTICE ACT

CJA

Counsel appointed under the Criminal Justice Act must file their vouchers no later than 60 days after final disposition of the case. If no petition for certiorari is filed, the 60 days runs from the date of judgment. If a petition for certiorari is filed, the 60 days runs from the date of filing the petition.

PETITION FOR WRIT OF CERTIORARI (Sup. Ct. R. 13)

Filing Time

Review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for compelling reasons. The petition must be filed in the United States Supreme Court within 90 days of this Court's entry of judgment. The time does not run from the issuance of the mandate. If a petition for rehearing is timely filed, the time runs from the denial of that petition. Content, fees, and number of copies of a petition for writ of certiorari are governed by the Rules of the United States Supreme Court.

PATRICIA S. CONNOR
CLERK

Supreme Court, U.S.
FILED
DEC 20 2001
CLERK

No. 01-738

In The

Supreme Court of the United States

RICHARD N. MOSEMAN AND DANIEL ROUSSEAU,

Petitioners,

v.

BLAKE VAN LEER, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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STATEMENT PURSUANT TO RULE 29.6

Respondents Garnet of Maryland, Inc. and Garnet of Virginia, Inc., now known as King George Landfill, Inc., are owned by USA Waste of Maryland, Inc., a wholly owned subsidiary of Waste Management, Inc. Waste Management, Inc. is a publicly held corporation trading on the New York Stock Exchange under the symbol "WMI."

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15 U.S.C. § 78cc(a) 1

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Blake Van Leer ("Van Leer"), BKJB Partners ("BKJB"[1]), and the Garnet Companies[2] oppose the petition by Richard N. Moseman ("Moseman") and Daniel Rousseau ("Rousseau") for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

COUNTERSTATEMENT OF THE CASE

The Petition is premised upon Moseman and Rousseau's assertion that the Fourth Circuit's application of the "reasonable inquiry" standard to Section 29(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78cc(a), conflicts with the "actual knowledge" standard applied in the Ninth and Fifth Circuits. This supposed conflict is both imaginary and, when viewed in light of the undisputed facts of this case, irrelevant.

This dispute arises from the 1996 sale of several landfill development companies owned by Moseman, Rousseau, Van Leer and BKJB to Sanifill, Inc. In exchange for the millions of dollars and other consideration they received in that transaction, Moseman and Rousseau each

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[1] "BKJB" includes Respondents Robert D. Cheeley, Keith Breedlove, James E. Butler, Jr., and Bobby M. Thomas, and the BKJB Partnership.

[2] "The Garnet Companies" refers to Respondents Garnet of Maryland, Inc., Garnet of Virginia, Inc., Garnet, Inc., Garnet Enterprises, Inc., Cross Road Trail, Inc., Rollins Avenue, Inc., and King George Land Co.

agreed to release and forever discharge any and all claims against Van Leer, BKJB and the other parties to the transaction. Despite those releases, Moseman and Rousseau later sued Van Leer, BKJB and the Garnet Companies claiming that they (Moseman and Rousseau) had been defrauded in the 1996 transaction. Both lower courts found their claims barred by the releases they signed, but Moseman and Rousseau argue that the releases are "void" under Section 29(a) because they purportedly lacked "actual knowledge" of the supposed fraud when they signed the releases. Yet, even if "actual knowledge," rather than "reasonable inquiry," is the appropriate standard, the facts simply fail to support Moseman and Rousseau's argument.

As Rousseau acknowledged in his sworn declaration, the negotiations with Blanchet, the first prospective investor, and then Sanifill were "every man for himself." Declaration of Daniel M. Rousseau, Exhibits to BKJB Defendants' Motion for Summary Judgment against Moseman (hereinafter "Summary Judgment Exhibits"), Ex. B. See also Petition at 18a. Each of the shareholders was advised repeatedly by the Garnet Companies' corporate counsel to retain separate legal counsel for those negotiations; only Rousseau chose not to heed that advice. Rousseau negotiated his own deal with Blanchet which included terms, such as a five-year consulting agreement and lifelong health insurance, specific to Rousseau's needs. Rousseau knew that the shareholders were negotiating different deals, but he never asked for any information about the other shareholders' compensation. Upon learning that negotiations with Blanchet had failed and that negotiations were going forward with

Sanifill, Rousseau immediately informed Van Leer that he (Rousseau) would be satisfied with the same terms of redemption he had agreed to accept from Blanchet.

Accordingly, on January 3, 1996 – the day before Van Leer and BKJB began negotiating the letter of intent with Sanifill – Rousseau executed a redemption agreement on the same terms he had negotiated with Blanchet. That same day, Rousseau executed a mutual release in which he agreed to release and forever discharge any and all claims against Van Leer, BKJB and the other parties to the transaction. In signing the mutual release, Rousseau acknowledged that he entered the mutual release "voluntarily," "without duress or compulsion," and of his own free will, and that he was *not* "relying upon any representation, oral or written, made by the other parties, or any of them, or their agents or representatives." Petition at 17a-18a.

Like Rousseau, Moseman negotiated his own deal with Blanchet with terms, such as a $1 million advance to save his California ranch from foreclosure, specific to Moseman's needs. And like Rousseau, Moseman told Van Leer that he was willing to redeem his interests in the Sanifill transaction under essentially the same terms as in the proposed Blanchet transaction. Unlike Rousseau, however, Moseman continued to negotiate with Van Leer for additional compensation after the letter of intent with Sanifill was signed on January 5, 1996. After several days of negotiations, Moseman agreed on January 9, 1996, to redeem his stock on better terms than he had secured from Blanchet. Like Rousseau, Moseman agreed to execute a mutual release in favor of the other parties. Prior to signing the mutual release, however, Moseman requested

additional information from Van Leer and the Garnet Companies' corporate counsel, Barry Levin, about the compensation Van Leer was to receive from Sanifill. Moseman knew that the shareholders were receiving different compensation terms.[3] Moreover, Moseman did not trust Van Leer. Although Van Leer and Levin informed Moseman that Van Leer was to receive a cash payment up front and deferred payments based upon the operation of the landfill (*i.e.*, a royalty) in an amount that was expected to exceed Moseman's overall compensation, they refused to provide Moseman with more specific information or any documentation related to the Sanifill transaction.

In light of Van Leer and Levin's refusal to provide information and Moseman's distrust of Van Leer, Moseman believed that Van Leer was trying to deceive him. Moreover, Moseman formed this belief *before* he signed the mutual release, as his attorney, Andrew Shafer, candidly explained:

> Q: Well, there was a part of you that believed that other parties to this transaction were getting a better deal than Mr. Moseman; correct?
>
> A: Well, you know, certainly you would say to yourself – well, why not. *Obviously, there is some sugar going on back here and who knows what.* That tied in with Levin's comment about Blake [Van Leer] getting somewhat more than Dick [Moseman].

---

[3] In fact, Moseman talked with Rousseau and learned that Rousseau was receiving less compensation than Moseman, but Moseman did not apprise Rousseau of that fact.

Q: What do you mean by "some sugar going on back here"?

A: That there was something happening that they didn't want us to know. *It was pretty obvious.* Otherwise, why wouldn't they give us the document?

Q: You recognized that at the time of the deal?

A: *I recognized at the time of the deal that I didn't think that they were telling me everything that there was to be told.* Obviously, because they would have given me the document.

Q: And, in fact, the reason they weren't telling you everything, you believed at that time, was that other parties to the transaction were being treated better than your client[?]

A. Well, Barry [Levin] told me that. That Blake [Van Leer] was getting more. My assumption was that Blake didn't want Dick [Moseman] to know that he was getting more.

Deposition of Andrew Shafer, Summary Judgment Exhibits, Ex. J, at 376-77 (emphasis added). See also Petition at 22a. Although Moseman and Shafer knew that they were being denied information, they did not ask BKJB or Sanifill (or their respective counsel) for any information or inform them that Moseman was being denied information.

Despite his distrust of Van Leer, his knowledge that he was being denied information, and his belief that he was being deceived about the Sanifill transaction, Moseman executed the mutual release on January 24, 1996. In the mutual release, which Shafer helped draft, Moseman agreed to release and forever discharge any and all claims

against Van Leer, BKJB and the other parties to the transaction. Moseman also acknowledged that he entered the mutual release "voluntarily," "without duress or compulsion," and of his own free will, and that he was *not* "relying upon any representation, oral or written, made by the other parties, or any of them, or their agents or representatives." Petition at 17a. More importantly, in signing the mutual release, Moseman made the conscious decision not to file a lawsuit. As Shafer testified:

> Q: At the time that . . . Moseman signed the Mutual Release, [Moseman's California] ranch was no longer in danger. Right?
>
> A: Yes. At that time the debt [on the ranch] had been satisfied. *And so at that point, the equation was do we have a lawsuit over this or do we go forward?* Recognize, my client still had not received the $2.5 million on the note.
>
> * * *
>
> Q: The original question though was why Mr. Moseman signed the Mutual Release, knowing full well that he had been denied material information.
>
> A: At that point [Mr. Moseman] still hadn't received the promissory note. Without the promissory note, there was no entitlement to the money, necessarily. *He would have been looking at buying a lawsuit. And a decision was made to sign [the Mutual Release].*

Id. at 227-28. Moseman and Shafer simply made the business decision not to "rock the boat" and to "tak[e] what we got." *Id.* at 227, 376.

Given the foregoing facts, the distinction between "actual knowledge" and "reasonable inquiry" is meaningless. At the time Rousseau executed his release, he knew that it was "every man for himself" and that the other shareholders were negotiating different deals. Nevertheless, Rousseau accepted his deal and signed his release *before* Van Leer and BKJB even began negotiating the letter of intent with Sanifill. Similarly, at the time Moseman executed his release, he actually believed that he was being deceived, but chose to accept his deal rather than file a lawsuit.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT IN THE CIRCUITS

Contrary to Petitioners' main argument, the Circuits are not split over the question presented. No court of appeals has ever rejected the interpretation of Section 29(a) espoused by the Seventh Circuit in *Goodman v. Epstein*, 582 F.2d 388 (7th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979), and now by the court below. The cases cited by Petitioners – *Royal Air Properties v. Smith*, 333 F.2d 568, 571 (9th Cir. 1964); *Burgess v. Premier Corp.*, 727 F.2d 826 (9th Cir. 1984); and *Murtaugh v. University Computing Co.*, 490 F.2d 810 (5th Cir. 1974) – do not conflict with *Goodman*. Indeed, they do not address the issue at all.

Royal Air, the flagship of Petitioners' argument, does not even involve a release. The defendant in *Royal Air* contended that the plaintiff was aware or should have been aware of the pertinent undisclosed information and thereby "waived" his claim. The district judge went so far

as to say that the plaintiff may have been negligent for not discovering the fraud earlier but that a *waiver – not a release* – required actual knowledge of all the facts. 333 F.2d at 571. The Ninth Circuit did not write as much as a single syllable on the subject of Section 29(a) or releases.

Similarly, the Fifth Circuit did not consider a release in *Murtaugh*. Once again, the issue related to the plaintiffs' *waiver* of rights in the context of a settlement agreement. After the jury returned a defense verdict, plaintiffs appealed arguing that Section 29(a) barred any "waiver" of their claims unless they had "intentionally and knowingly waived the rights granted them by the securities laws" and that no such finding was made by the jury. *Id.* 490 F.2d at 817. Because the plaintiffs had failed to request an appropriate special jury interrogatory, the court of appeals rejected plaintiffs' argument, holding that the trial court's finding that the plaintiffs' "intentionally and knowingly" waived their claims was not clearly erroneous. *Id.* At no point did the court in *Murtaugh* discuss, much less reject, a "reasonable inquiry" standard.[4]

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[4] Petitioners also attempt to establish a split in the circuits by citing to *Childs v. RIC Group, Inc.*, 447 F.2d 1407 (5th Cir.), *aff'g per curiam*, 331 F. Supp. 1078 (N.D. Ga. 1971). This one paragraph opinion states "Assigning written reasons, the district court granted summary judgment against the plaintiffs-appellants, Childs and Paris. They have failed to demonstrate error in that judgment on this appeal." *Id.* (footnote giving citation to district court opinion omitted). Clearly the Fifth Circuit makes no pronouncement on any point of law in this statement. Like *Royal Air* and *Murtaugh*, the opinion of the district court in *Childs* addresses a waiver – not a release – and makes no mention at all of the reasonable inquiry standard, much less its application to a release.

The Ninth Circuit's *Burgess* opinion is, at least, a release case. There, the plaintiffs had purchased interests in the defendants' tax shelter investments in cattle herds. *Id.* 727 F.2d at 830. When those investments performed poorly, the plaintiffs sold their interests back to the defendants and executed releases as part of the transactions. *Id.* On the way to losing the case at trial, the defendants unsuccessfully sought summary judgment and then a directed verdict based on the releases. *Id.* Citing *Royal Air* without discussion, the court of appeals stated that the release would be valid "only if the [plaintiffs] had 'actual knowledge' that such claims existed." *Id.* at 831. The court then simply noted that the state of the plaintiffs' knowledge was sufficiently disputed to preclude summary judgment on that point. Moreover, because a reasonable juror could find from the evidence that the plaintiffs lacked *all knowledge* of their claims, the failure to grant a directed verdict was not error. *Id.* Once again, the "reasonable inquiry" standard was not raised or discussed in the opinion, and certainly was not rejected.

In *Goodman*, on the other hand, the Seventh Circuit squarely faced the issue of whether actual knowledge of a claim was required before it could be released. The court found that a rule that "places some duty of inquiry on the party signing the release, is the more readily acceptable as fulfilling the policy requirement of the federal securities laws and needs of judicial economy." 582 F.2d at 403. The Seventh Circuit also addressed the very point on which Moseman and Rousseau argue that *Goodman* went astray of controlling Supreme Court authority: the holding in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), rejecting a "due diligence" defense in Rule 10b-5 actions.

The court of appeals cited a "significant distinction" between the substantive merits of a securities fraud claim and a release of those claims:

> In the substantive merits aspect of the case, it appears only fair that a plaintiff, compelled to prove that the defendant committed an intentional or reckless deception, should not also be forced to prove that he (the plaintiff) did not in any way contribute to his own harm.
>
> *A totally different situation occurs, however, when we are dealing with a plaintiff who has affirmatively acted to release another party from any possible liability in connection with a transaction in securities.* The mere fact that an individual has been asked to sign a release should be sufficient to put that individual on notice that a reasonable inquiry should be undertaken. No longer do we have the innocent investor sitting back and merely holding his security; we are not requiring an innocent investor continually to question management concerning his investment, but only to undertake a "reasonable inquiry" prior to taking the affirmative act of signing a release.

Id. at 404 (emphasis added).

Perhaps the biggest problem with the argument that *Royal Air* conflicts with *Goodman* is that the Ninth Circuit, which wrote *Royal Air*, has expressly rejected it. In *Petro-Venture, Inc. v. Takessian*, 967 F.2d 1337, 1338 (9th Cir. 1992), the Ninth Circuit specifically stated that it had not yet decided the issue raised in *Goodman*.

> The general rule in this circuit is that "[a] release is valid for purposes of a federal securities claim only if [there was] 'actual knowledge'

> that such claims existed." *Burgess v. Premier Corp.*, 727 F.2d 826, 831-32 (9th Cir. 1984) (citation omitted). *However, we must decide if the facts of this case warrant an exception to this rule.*

Id. at 1338 (emphasis added). The "exception" to the "general rule" would allow the release of claims that would have been discovered upon a reasonable inquiry.

To determine whether such an "exception" was warranted, the court in *Petro-Venture* explained that *Royal Air* did not answer the question at all:

> *Royal-Air* deals with a waiver of rights under the Securities Exchange Act of 1934. A waiver is "the voluntary or intentional relinquishment of a known right", but "it is unilaterally accomplished." In contrast, the release here is the result of negotiations between parties of equal bargaining power: it was not a unilateral relinquishment of rights.

Id. at 1342 (citations omitted).

Rather than *Royal Air*, the Ninth Circuit turned to *Goodman* for guidance:

> [O]ther circuits have not applied the federal policy against the release of unknown or subsequently maturing causes of action without considering the circumstances in which a right was released. . . . The Seventh Circuit has held that a party has a duty of inquiry when signing a release. The Seventh Circuit concluded that "the mere fact that an individual has been asked to sign a release should be sufficient to put that individual on notice that a reasonable inquiry should be undertaken." While we do not decide the issue of reasonable inquiry, we assume by

> the unambiguous language of the release that the parties knew they were giving up all rights to future claims.

Id. at 1342-43 (citations omitted).

In short, the only difference between the positions adopted by the Ninth Circuit and the position adopted in the Seventh and Fourth Circuits is one of semantics. While the Seventh and Fourth Circuits have endorsed "reasonable inquiry" as the basic standard for determining the validity of a release, the Ninth Circuit views "reasonable inquiry" as an exception to the general rule of actual knowledge. The Ninth Circuit's ultimate position on that "exception" may technically be undecided, but the Ninth Circuit makes clear that: (1) *Royal Air* does not decide the issue, (2) *Royal Air* does not conflict with *Goodman*, and (3) the reasoning of the *Goodman* decision is received with favor in that circuit. The Fifth Circuit, on the other hand, has never addressed the issue in any form. Hence, this Court has no "conflict in the circuits" to resolve.

II. THE DECISION BELOW WAS CORRECT

Even if there were a conflict in the circuits, this case fails to present facts that would warrant a resolution of such conflict. Irrespective of the standard applied, the decision below unquestionably is correct. With respect to Moseman, his claim would have failed under the actual knowledge standard advocated by the Petition. The uncontroverted facts as found by the district court and endorsed by the Fourth Circuit – which are not challenged by the petition – cause his claim to fail under

either standard. Moseman's lawyer helped to draft the release. At the time the release was signed, "it was obvious" to Moseman and his lawyer that Van Leer was receiving compensation in the deal that he was not disclosing to Moseman, and Moseman in fact believed he was being deceived. Nevertheless, Moseman made the conscious decision to take the money and sign the release rather than file a lawsuit. Hence, Moseman cannot benefit from any distinction between "actual knowledge" and "reasonable inquiry."

Rousseau, on the other hand, attempts to avail himself of the refuge of deliberate ignorance. Despite repeated admonitions that he retain legal counsel and his admitted understanding that it "was every man for himself," Rousseau consciously decided to make no inquiries at all, reasonable or otherwise, before accepting his deal and signing the release. Moreover, at the time he signed the release, Rousseau knew that the other shareholders were negotiating different deals and that he was foregoing his opportunity to negotiate with the new purchaser, Sanifill. Regardless of any distinction between "actual knowledge" and "reasonable inquiry," Rousseau ought not benefit from deliberately sticking his head in the sand.

Petitioners' hyperbole that the Fourth Circuit's decision "provides an instruction manual for persons committing intentional securities fraud" stands the truth on its head. The Fourth, Seventh and Ninth Circuits simply instruct persons who sign releases to make a reasonable inquiry to determine what they are releasing. It is the Petitioners, however, who would have this Court author a cookbook for mischief, allowing parties to avoid

releases merely by claiming a lack of "actual knowledge" or by remaining deliberately ignorant. Plainly, such a rule would undermine the utility of releases, making them the subject of endless litigation of what was *actually known* by the releasing party. For all the reasons advanced by the Fourth, Seventh and Ninth Circuits, this would be very bad law indeed.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF OF PETITIONERS

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To the extent that the Fourth Circuit's decision here does not directly conflict with the cited decisions of other circuits, it is only because no other court, not even the Seventh Circuit whose decision the Fourth Circuit purported to follow, has so blatantly ignored the mandate of section 29(a) of the Exchange Act as to hold that a party to a securities transaction is prevented from asserting a securities claim arising from that very transaction by a release executed as a part thereof. In any event, the fact remains that the Fourth Circuit was able to achieve that result only by applying the

Seventh Circuit's "reasonable inquiry" standard and rejecting the "actual knowledge" standard as applied by the Fifth and Ninth Circuits in the decisions cited in the petition.

Respectfully submitted,

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